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ORIGINAL

Number 91-5952

UNITED STATES SUPREME COURT 1991-1992 TERM

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

WAYNE HUNT,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

Whether the double jeopardy clause of the fifth amendment to the United States Constitution is violated by holding a second trial-like, non-capital sentence enhancement proceeding after a failure of proof at a prior identical type of sentence enhancement proceeding.

The New York State Court of Appeals held that it is not.

TABLE OF CONTENTS

Page

Table of Authorities..... 5

Reports of Opinions Delivered in Courts Below..... 5

Jurisdictional Basis..... 6

Constitutional Provisions and Statutes Involved..... 6

Statement of Case..... 12

Reasons for Allowing the Writ..... 15

Appendix

1. Decision of the New York State Court of Appeals, dated July 1, 1991 (____ NY2d ___, ___ NYS2d ___).....A-1

2. Decision of the Appellate Division of the Supreme Court, Third Department, dated March 23, 1989 (148 AD2d 836, 539 NYS2d 109).....A-4

3. Decision of the Appellate Division of the Supreme Court, Third Department, dated May 16, 1989.....A-7

4. Decision of the Appellate Division of the Supreme Court, Third Department, dated June 14, 1990 (162 AD2d 782, 557 NYS2d 694).....A-8

5. Petitioner's brief in court below.....A-9

6. Respondent's brief in court below.....A-78

7. Petitioner's Record on Appeal in court below.....A-94

Statement Pursuant to CPLR 5531.....A-97

Notice of Appeal to Appellate Division, Third Department.....A-98

Minutes of Plea.....A-100

Defendant's Motion.....A-121

Notice of Motion.....A-121

Affidavit of Paul J. Connolly.....A-122

Exhibit A - Appellate Division Decision, dated March 23, 1989.....A-125

Exhibit B - Appellate Division Decision, dated May 16, 1989.....A-128

Supplemental Affidavit of Paul J. Connolly.....A-129

Exhibit A - People's Second Felony Offender Statement.....A-136

Attachment - Appellate Division Decision, dated March 23, 1989.....A-139

Attachment - Appellate Division Decision, dated May 16, 1989.....A-142

Attachment - Judgment and Probation Commitment Order, dated May 16, 1977.....A-143

Defendant's Memorandum of Law.....A-144

People's Memorandum of Law.....A-161

Resentencing Minutes of August 30, 1989.....A-166

Documents Presented at Resentencing:

Indictment No. 859825, dated September 6, 1985.A-199

Conviction No. 27-1149 (certified).....A-201

Special Information charging predicate offense.A-202

Certificate of Conviction #27-1149.....A-204

Indictment No. CR 76-738, Western District of Louisiana.....A-205

Affidavit of Understanding of Maximum Penalty and Constitutional Rights.....A-207

Judgment and Probation/Commitment Order, filed February 14, 1977.....A-208

Judgment and Probation/Commitment Order, filed May 16, 1977.....A-210

November 27, 1987 Sentencing Minutes.....A-212

Statement Pursuant to Section 400.21 of the Criminal Procedure Law, dated November 24, 1987.....A-221

Judgment of County Court, Rensselaer County, Rendered August 30, 1989.....A-223

Order of the Supreme Court, Appellate Division, Third Department, entered June 14, 1990.....A-224

Opinion of the Supreme Court, Appellate Division, Third Department, dated June 14, 1990.....A-225

Order Granting Leave to Appeal.....A-227

Stipulation.....A-228

TABLE OF AUTHORITIES

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

____ NY2d ____, ____ NYS2d ____, (New York Court of Appeals, Slip Opinion July 1, 1991)

162 AD2d 782, 557 NYS2d 694 (3rd Dept., 1990)

148 AD2d 836, 539 NYS2d 109 (3rd Dept., 1989)

JURISDICTIONAL BASIS

Petitioner seeks review of the judgment of the New York State Court of Appeals, dated July 1, 1991 (___ NY2d ___, ___ NYS2d ___), which affirmed the order of the Appellate Division of the Third Department of the New York State Supreme Court, entered June 14, 1990 (162 AD2d 182, 557 NYS2d 694 (3d Dept., 1990)). The Appellate Division order, in turn, affirmed the sentence imposed on petitioner in the County Court of the County of Rensselaer and the State of New York on August 30, 1989. (148 AD2d 836, 539 NYS2d 109 (3d Dept., 1989))

The Supreme Court has jurisdiction to grant a writ of certiorari herein pursuant to 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Fifth Amendment, Double Jeopardy Clause:

> "[N]or shall any person for the same offense be twice put in jeopardy of life or limb... ."

2. N.Y. Crim. Proc. Law §400.21 (McKinney 1983):

> Procedure for determining whether defendant is a second felony offender.
>
> 1. Applicability. The provisions of this section govern the procedure that must be followed in any case where it appears that a defendant who stands convicted of a felony has previously been convicted of a predicate felony and may be a second felony offender as defined in section 70.06 of the penal law.

2. Statement to be filed. When information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction. Where the provisions of subparagraph (v) of paragraph (b) of subdivision one of section 70.06 of the penal law apply, such statement also shall set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation set forth in subparagraph (iv) of paragraph (b) of such subdivision.

3. Preliminary examination. The defendant must be given a copy of such statement and the court must ask him whether he wishes to controvert any allegation made therein. If the defendant wishes to controvert any allegation in the statement, he must specify the particular allegation or allegations he wishes to controvert. Uncontroverted allegations in the statement shall be deemed to have been admitted by the defendant.

4. Cases where further hearing is not required. Where the uncontroverted allegations in the statement are sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must enter such finding and when imposing sentence must sentence the defendant in accordance with the provision of section 70.06 of the penal law.

5. Cases where further hearing is required. Where the defendant controverts an allegation in the statement and the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must proceed to hold a hearing.

6. Time for hearing. In any case where a copy of the statement was not received by

the defendant at least two days prior to the preliminary examination, the court must upon request of the defendant grant an adjournment of at least two days before proceeding with the hearing.

7. Manner of conducting hearing.

(a) A hearing pursuant to this section must be before the court without jury. The burden of proof is upon the people and a finding that the defendant has been subjected to a predicate felony conviction must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to a trial of the issue of guilt.

(b) A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

(c) At the conclusion of the hearing the court must make a finding as to whether or not the defendant has been subjected to a predicate felony conviction.

8. Subsequent use of predicate felony conviction finding. Where a finding has been entered pursuant to this section, such finding shall be binding upon that defendant in any future proceeding in which the issue may arise.

3. New York State Penal Law §70.06 (McKinney 1987):

1. Definition of second felony offender.

(a) A second felony offender is a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;

(iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;

(iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;

(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period of periods equal to the time served under such incarceration;

(vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate felony conviction.

2. Authorized sentence. Except as provided in subdivision five of this section, when the court has found, pursuant to the provisions of the criminal procedure law, that a person is a second felony offender the court must impose an indeterminate sentence of imprisonment. The maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

3. Maximum term of sentence. Except as provided in subdivision five of this section, the maximum term of an indeterminate sentence for a second felony offender must be fixed by the court as follows:

(a) For a class A-II felony, the term must be life imprisonment;

(b) For a class B felony, the term must be at least nine years and must not exceed twenty-five years;

(c) For a class C felony, the term must be at least six years and must not exceed fifteen years;

(d) For a class D felony, the term must be at least four years and must not exceed seven years; and

(e) For a class E felony, the term must be at least three years and must not exceed four years.

4. Minimum period of imprisonment. (a) The minimum period of imprisonment for a second felony offender convicted of a class A-II felony must be fixed by the court at no less than six years and not to exceed twelve and one-half years and must be specified in the sentence.

(b) Except as provided in paragraph (a), the minimum period of imprisonment under an indeterminate sentence for a second felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

5. Lifetime probation. Notwithstanding any other provision of law the court may sentence a person convicted of a class A-II felony or a class B felony defined in article two hundred twenty of this chapter to lifetime probation in accordance with the provisions of section 65.00.

STATEMENT OF CASE

On November 24, 1987, petitioner Wayne Hunt was sentenced in Rensselaer County Court (hereinafter "County Court") as a "second felony offender", a term defined by N.Y. Penal Law §70.06. (A-191-193; 223) On October 15, 1987, petitioner had pleaded guilty in County Court to eighteen counts of a fifty-count indictment. (A-113-118) At the ensuing sentencing hearing, the People presented County Court with a statement pursuant to N.Y. Crim. Proc. Law §400.21 (McKinney 1983) (hereinafter, "CPL §400.21 Statement") alleging that petitioner was the subject of a specific prior conviction, and was, therefore, a "second felony offender" as defined by N.Y. Penal Law §70.06 (McKinney 1987). (A-221) By statute (N.Y. Penal Law §70.06 (McKinney 1987)), the sentence of one adjudicated a second felony offender was required to be enhanced - i.e., a defendant found to be a second felony offender was required to be given a lengthier term of imprisonment than one who had been convicted of the same offense but who was not a second felony offender. Petitioner was sentenced as a second felony offender. (A-214-218)

On appeal, the Appellate Division of the Supreme Court, Third Department (hereinafter "Appellate Division"), held that the conviction alleged in the People's CPL §400.21 statement did not meet the statutory requirements for a prior felony which would make petitioner a second felony offender. Accordingly, petitioner's sentence was vacated, and petitioner was remanded to County Court for resentencing "as a first felony offender". (A-6)

Subsequently, the People moved the Appellate Division for leave to reargue. That court, granting the People's motion, modified its prior decision by deleting the aforesaid language requiring petitioner to be sentenced as a first felony offender. (A-7)

Before resentencing, petitioner submitted to County Court a motion for an order precluding the holding of another second felony offender proceeding, on the ground that such a proceeding would violate the respective double jeopardy clauses of the New York State Constitution and the United States Constitution. (A-121-124; 144-160) Petitioner reiterated this motion at the resentencing hearing of August 30, 1989. (A-169-171) County Court denied petitioner's motion. (A-180-181; 191)

Accordingly, a second second felony offender proceeding was held. At it, the People again submitted a CPL §400.21 Statement. (A-136; 167-168) This alleged that petitioner was the subject of a predicate felony conviction other than the one the People had adduced at the first second felony offender proceeding. Specifically, the prior felony conviction, dating from 1977, was entered in the United States District Court of the Western District of Louisiana. Further, the People offered a certified copy of this judgment of conviction. (A-169; 210-211) Concluding that the People's proof established that the petitioner was a second felony offender, County Court sentenced petitioner as such. (A-191-194)

On appeal to the Appellate Division, petitioner again contended that subjecting him to the second second felony offender

hearing violated the double jeopardy clause. Citing People v. Sailor, 65 NY2d 224 (1985), the Appellate Division rejected petitioner's contention, and affirmed the judgment of conviction. (A-6-7)

On July 1, 1991, the New York State Court of Appeals affirmed the order of the Appellate Division on the basis of the lower court's opinion. One justice of the Court of Appeals dissented, on the ground that the double jeopardy clause forbid the second sentence enhancement proceeding. (A-1-3)

REASONS FOR ALLOWING THE WRIT

This case squarely presents an issue which has divided both state and federal courts and which this Court has expressly left open (Lockhart v. Nelson, 488 US 33, 37-38 n.6 (1988), 102 LEd2d 265, 271-272, 109 S Ct 285,289): whether the double jeopardy clause is applicable to trial-like, non-capital sentence enhancement proceedings.

In the state-court proceedings herein, petitioner was subjected to two sentence enhancement proceedings of the very same type, the purpose of which was to ascertain whether he was a "second felony offender" within the meaning of N.Y. Penal Law §70.06 (McKinney 1987). If petitioner were found to be a second felony offender, then, by statute, he was required to be sentenced to a lengthier term of imprisonment than he would be sentenced to were he not a second felony offender. N.Y. Penal Law §70.06 subds. (2)-(4) (McKinney 1987). At the first such hearing, the People offered evidence which, as a matter of law, was insufficient to prove petitioner a second felony offender. (A-5-6; 221) At the second second felony offender proceeding, however, the People offered legally sufficient evidence; accordingly, petitioner was found to be and was sentenced as a second felony offender. (A-136; 167-169; 191-194) Before it commenced, petitioner objected to this repeated second felony offender proceeding on the ground that, under Bullington v. Missouri, 451 US 430 (1981), his subjection to it violated the double jeopardy clause of the New

York State Constitution and the United States Constitution. (A-121-124; 144-160; 169-171) This argument was rejected by the sentencing court as well as the Appellate Division and the New York Court of Appeals, apparently on the ground that Bullington's application is limited to capital sentencing proceedings. (A-1-2; 8-9; 180-181; 191)

Bullington v. Missouri, supra, involved a capital murder trial's sentencing phase, at which the state had the burden of proving certain aggravating factors beyond a reasonable doubt, and the sentencer, a jury, had to choose between imposition of death and life in prison. At a first such hearing, the jury imposed life in prison, rather than death. Thereafter, however, the defendant obtained a retrial; again he was convicted of capital murder, and the state sought to subject him to a second sentencing hearing, at which he again would run the risk of death. Id at 435-437. The Supreme Court held that this second sentencing proceeding would violate the double jeopardy clause of the fifth amendment. "Having received 'one fair opportunity to offer whatever proof it could assemble', Burks v. United States, 437 US 1, 16, 57 LEd2d 1, 987 S Ct 2141", the Court concluded, "the State is not entitled to another." 451 US at 446.

Bullington left unclear the scope of its holding: is the double jeopardy clause applicable to trial-like sentence enhancement proceedings regardless of the severity of the punishments in issue, or only if one of those punishments is death?

That it dealt only with a sentence enhancement proceeding in which capital punishment was in issue supports the view that Bullington merely makes the double jeopardy clause applicable to trial-like capital sentencing proceedings.

That the reasoning in Bullington relied mainly on the trial-like nature of the procedure in issue, however, supports the contrary view. Thus, for example, in summarizing its conclusion in Bullington, this Court wrote that "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the issue of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial." 491 US 430, 446.

Not surprisingly, the courts are divided as to whether the double jeopardy clause applies to all trial-like sentence enhancement proceedings or, rather, to only those trial-like sentence enhancement proceedings which, like the one at issue in Bullington, place the defendant at risk of death. In the decision which petitioner asks this Court to review, a divided New York Court of Appeals has apparently concluded that the double jeopardy clause applies only to capital sentence enhancement proceedings. (A-1-2) The following courts reached the same conclusion: Denton v. Duckworth, 873 F2d 144 (7th Cir., 1989); Linam v. Griffin, 685 F2d 369 (10th Cir., 1982); People v. Brooks, 559 N.E.2d 859, 866 (Ill. App. Ct., 1990); State v. Lee, 660 S.W.2d 394 (Mo. App., 1983).

A number of courts, however, have concluded that the double jeopardy clause is applicable to trial-like, non-capital sentence enhancement proceedings: Durosko v. Lewis, 882 F2d 357 (9th Cir., 1989); Nelson v. Lockhart, 828 F2d 446 (8th Cir., 1987), rev'd on other grounds, 102 LEd 2d 275; Bullard v. Estelle, 665 F2d 1347 (5th Cir., 1982), cert. granted, 457 US 1116, vacated, 459 US 1139, on remand, 708 F2d 1020; State v. Hennings, 670 P2d 256 (Wash. Sup. Ct., 1983); Ex Parte Augusta, 639 S.W.2d 481 (Tex. Cr. App., 1982); People v. Quintana, 634 P2d 413 (Colo. Sup. Ct., 1981).

The one point on which all courts to have addressed this issue seem to agree is that the double jeopardy clause will not be applicable to a non-trial-like sentence enhancement proceeding; under Bullington, they reason, the sentencing proceeding's likeness to a trial is a sine qua non of the double jeopardy clause's application. See, e.g., People v. Brooks, supra, at 866-867; State v. Hennings, supra, at 258-262; Durosko v. Lewis, supra, at 359; Bullard v. Estelle, supra, at 1361 n. 28.

An ideal case for resolution of this issue would have two key features. The first is that the enhancement proceeding in issue would closely resemble a trial. That the instant case has this feature is demonstrated below.

At issue in a second felony offender proceeding (N.Y. Crim. Proc. Law §400.21 (McKinney, 1983)) is whether the defendant is a "second felony offender". Pursuant to N.Y. Penal Law §70.06 (McKinney 1987), a second felony offender is a defendant who has been convicted of a felony on which sentence was imposed not more

than ten years before commission of the present felony, excluding prison time.

If the People are to prove the defendant a second felony offender, they must file before sentencing a "statement ... setting forth the date and place of each alleged predicate felony conviction." N.Y. Crim. Proc. Law §400.21(2) (McKinney 1983). The defendant is to be provided a copy of the statement, and is to be asked "whether he wishes to controvert any allegation in the statement". N.Y. Crim. Proc. Law §400.21(3) (McKinney 1983). Where the allegations, if any, which the defendant does not wish to controvert are insufficient to prove the defendant a second felony offender, the court must hold a hearing. At the defendant's request, this hearing may not be commenced within less than two days following the defendant's receipt of the second felony offender statement. N.Y. Crim. Proc. Law §400.21(6) (McKinney 1983).

Criminal Procedure Law §400.21(7) specifies the manner in which the hearing is to be conducted: the burden of proof is the People's; the standard of proof is "beyond a reasonable doubt"; and the rules governing admission of evidence are those "applicable to a trial of the issue of guilt."

If the court concludes that the evidence admitted at the hearing establishes beyond a reasonable doubt that the defendant is a second felony offender, the court must sentence him as such. N.Y. Penal Law §70.06(2) (McKinney 1987); N.Y. Crim. Proc. Law §400.21(4) (McKinney 1983).

Thus, the second felony offender proceeding is in no significant respect different from a trial on the issue of guilt or innocence: the burden of proof, the standard of proof, the rules of evidence, and the absence of discretion are common to both[1].

Sailor v. Sculley, 836 F2d 118 (2d Cir. 1987), points up the other feature of this case which makes it particularly well suited for review by this Court. In Sailor, the Court of Appeals for the Second Circuit, reviewing a judgment of the New York State Court of Appeals, concluded that the double jeopardy clause was not violated by holding a second felony offender proceeding after a failure of proof at a prior different type of sentence enhancement proceeding, namely, a persistent felony offender proceeding. The court reasoned that, just as the traditional application of the double jeopardy clause to the guilt - innocence phase of a criminal trial requires that the offenses at issue be the same, so, for the double jeopardy clause to apply to sentence enhancement proceedings, the proceedings must be the same in terms of the elements to be proved in each and the enhanced punishments at risk of which each places the defendant. Id. at 125-126.

Here, as in Bullington, but in contrast to Sailor, petitioner was successively subjected to two identical types of sentence

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[1] Though it is true that, under New York's second felony offender proceeding, the sentencer is a judge, this Court has held that application of the double jeopardy clause does not depend on whether the sentencer is a judge rather than a jury. Arizona v. Rumsey, 467 US 203, 210 (1984); See, also, Bullard v. Estelle, supra, 655 F2d at 1355 n. 17.

enhancement proceedings. Accordingly, here, insufficient similarity of the successive sentence enhancement proceedings could not be a basis for concluding that the double jeopardy clause is inapplicable.

Thus, this case has two features which make it well suited for use to resolve the question left open by Bullington: the enhancement proceedings in issue are undeniably trial like, and the second enhancement proceeding to which petitioner was subjected was the very same type as the first.

CONCLUSION

If the double jeopardy clause applies to any non-capital sentence enhancement proceeding, it must apply here, where petitioner was subject to a second trial-like sentence enhancement proceeding after a failure of proof at a prior identical type of proceeding. The issue of its applicability was certainly preserved, and has been reviewed by New York's highest court. Accordingly, this case presents an excellent opportunity for this Court to decide an important constitutional question which has divided both federal and state courts.

Respectfully submitted,

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State of New York
Court of Appeals

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3 No. 134
The People &c.,
Respondent,
v.
Wayne Hunt,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Paul J. Connolly, for appellant.
Youel C. Smith, III, for respondent.

Order affirmed for the reasons stated in the memorandum at the Appellate Division (162 AD2d 782). Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion.

KAYE, J. (dissenting):

The issue presented in this case is the one we explicitly left open in Sailor, where the court wrote that it was "unnecessary to decide in this appeal whether the prosecution may conduct more than one persistent felony offender or second offender hearing in the same sentencing proceeding after failing to prove the underlying convictions or conviction." (People v Sailor, 65 NY2d 224, 236, cert. denied 474 US 982.)

The second felony offender hearing in Sailor followed a persistent felony offender hearing, and this Court emphasized the wide discretion afforded the judge at the persistent felony offender hearing in rejecting defendant's double jeopardy challenge (65 NY2d at 234). Such discretion is not afforded the judge in the second felony offender hearing. If the prosecution proves beyond a reasonable doubt that defendant is a second felony offender, the judge must impose the appropriate enhanced

sentence (compare, CPL 400.20[10] with CPL 400.21[4] and [7]; see also, Sailor v Scully, 836 F2d 118, 125). In addition, because of the standard of proof at the second felony offender hearing--beyond a reasonable doubt--the procedure resembles a trial (see, Arizona v Rumsey, 467 US 203, 212). By contrast, at a persistent felony offender hearing, matters relating to a defendant's history and character, and the nature and circumstances of his criminal conduct, need only be established by a preponderance of the evidence (CPL 400.21[6]). Thus, the issue raised in this case is not controlled by our decision in Sailor. The Court's holding today enlarges Sailor.

Even apart from what I see as a constitutional infirmity, statutory law seems to prohibit the procedure here. CPL 400.21 provides that "[w]here information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction [emphasis added]." Although this argument was not raised by defendant prior to sentencing, this language suggests that as a matter of statutory law, the prosecution should not be allowed repeated predicate felony offender hearings when it is aware of all prior crimes at the time of the original proceeding (see, Bullington v Missouri, 451 US 430, 445).

I would reverse and remit for resentencing.

* * * * * * * * * * * * * * * * * *

Order affirmed for the reasons stated in the memorandum at the Appellate Division (162 AD2d 782). Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion.

Decided July 1, 1991

Supreme Court—Appellate Division
Third Judicial Department

March 23, 1989 56022

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v
WAYNE HUNT,
Appellant.

CASEY, J.

Appeal from a judgment of the County Court of Rensselaer County (Dwyer, Jr., J.), rendered November 24, 1987, convicting defendant upon his plea of guilty of the crimes of kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts).

On October 15, 1987, prior to trial and pursuant to a plea bargain, defendant entered a plea of guilty to kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts). Upon the application of the prosecution that defendant be sentenced as a second felony offender, defendant was sentenced as such in accordance with the terms of the plea bargain to the maximum prison sentences allowed: 12 1/2 to 25 years for each of the convictions of kidnapping and sodomy in the first degree, 7 1/2 to 15 years on each of the convictions of use of a child in a sexual performance, and 3 1/2 to 7 years for each of the convictions of sodomy in the second degree and promoting a sexual performance of a child; all sentences are to run concurrently.

The convictions stemmed from a 60-count indictment accusing defendant of various crimes involving sexual abuse of children. The children included 14 boys and one girl, all ranging in age from 7 to 15 years, and the crimes were alleged to have been committed over a three-year period from 1982 to 1985, predominantly during the summer months and Christmas vacations. Prior to the plea, certain misdemeanor counts of the indictment were dismissed on motion of defendant as being time barred. After reviewing the minutes of the Grand Jury, defendant sought dismissal of other counts, contending they were not supported by legally sufficient evidence or were duplicitous. Before County Court's decision on this motion, the prosecution moved to amend the indictment by deleting 10 counts as time barred and by eliminating the duplicitous language. County

Supreme Court—Appellate Division
Third Judicial Department

Court treated this motion as a cross motion to defendant's motion to dismiss. The motion of defendant was denied and the cross motion of the prosecution was granted.

Defendant now claims that the denial of his motion to dismiss must be considered on this appeal, since his contentions survived his guilty plea. We disagree. After his voluntary plea of guilty, defendant is precluded from raising all issues related to his indictment, except jurisdictional ones (see, e.g., People v Scott, 3 NY2d 148, 152). In New York an indictment is jurisdictionally defective "only if it does not effectively charge the defendant with the commission of a particular crime" (People v Iannone, 45 NY2d 589, 600; accord, People v Ray, 71 NY2d 849, 850). Therefore, by pleading guilty, defendant waived any error made by County Court in allowing amendment of the indictment (see, People v Harris, 117 AD2d 752), as well as challenges based on lack of specificity as to when the crimes occurred and upon alleged duplicity (see, People v Nicholson, 98 AD2d 876). Waiver also applies to the sufficiency of the Grand Jury evidence supporting the indictment (see, People v Cohen, 52 NY2d 584, 587). Contrary to defendant's claim, this rule is not circumvented by raising these issues in a pretrial motion to dismiss (see, id.). In this regard, however, the Court of Appeals has stated that an indictment which fails to accord a defendant "fair notice of the charges made against him, so that he can prepare a defense and in order to avoid subsequent attempts to retry him for the same crime or crimes", is jurisdictionally defective (People v Ray, supra, at 850, quoting People v Wrights, 112 AD2d 38, 39 [Callahan, J., dissenting], revd on dissenting opn below 67 NY2d 749). Applying these stated principles, the indictment herein, in our opinion, satisfies the legal sufficiency and the fair notice requirements (see, People v Morris, 61 NY2d 290, 295). Considering the age of the victims and the amount of time that elapsed between the occurrence of the crimes and the date of the indictment, the two to three-month periods designated in the indictment as the time frame within which the crimes occurred are not so excessive on their face as to be unreasonable (see, People v Keindl, 68 NY2d 410, 419). Therefore, this claim of defendant lacks merit.

Defendant's next contention concerns the validity of his sentencing as a second felony offender. Although defendant did not raise this issue prior to sentencing, it appears that he was improperly sentenced as a predicate felon. The predicate felony, sodomy in the second degree, was alleged to have been committed on November 18, 1985. Inasmuch as no sentence was imposed upon that prior conviction before commission of the present felonies, and since no offense here has been alleged to have been committed after that date, defendant was improperly considered a predicate felon (see, Penal Law § 70.06 [1] [a], [b] [ii]; People v Kotler, 118

Supreme Court—Appellate Division
Third Judicial Department

02d 592, lv denied 67 NY2d 945) and is entitled to resentencing see, People v Giraldo, 106 AD2d 401, 402). The judgment of onviction must, therefore, be modified by vacating the sentences nposed and the matter must be remitted to County Court for efendant's resentencing as a first felony offender.

Judgment modified, on the law, by vacating the sentences iposed; matter remitted to the County Court of Rensselaer County or further proceedings not inconsistent with this court's decision; id, as so modified, affirmed.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and MERCURE, JJ., ncur.

ATT

5479

MAHON

56022

KANE, concur

56832 -

KANE, concur.

Supreme Court—Appellate Division
Third Judicial Department

May 16, 1989

54790 - In the Matter of the Claim of MICHAEL F. CERAMI, Appellant,
v
ROCHESTER CITY SCHOOL DISTRICT et al., Respondents.
WORKERS' COMPENSATION BOARD, Respondent.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals denied, without costs.

MAHONEY, P.J., KANE, CASEY, WEISS and LEVINE, JJ., concur.

56022 - THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v
WAYNE HUNT, Appellant.

Motion for reargument granted, and upon reargument decision dated March 23, 1989 amended so as to delete from the final sentence of the decision prior to the decretal paragraph the words "as a first felony offender".

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and MERCURE, JJ., concur.

56832 - RICHARD A. CARLINO, Respondent,
v
COUNTY OF ALBANY, Appellant.

Motion for reargument or for alternative relief denied, without costs.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and MERCURE, JJ., concur.

June 14, 1990

59839

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

WAYNE HUNT,

Appellant.

CASEY, J.

Appeal from a judgment of the County Court of Rensselaer County (Dwyer, Jr., J.), rendered August 30, 1989, which resentenced defendant following his conviction of the crimes of kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts).

On November 24, 1987, defendant was sentenced as a second felony offender in Rensselaer County Court to various indeterminate concurrent terms of imprisonment, the greatest of which was 12 1/2 to 25 years upon his plea of guilty to the crimes listed above. The statement filed by the prosecution pursuant to CPL 400.21 accused defendant of having been previously convicted of the felony of sodomy in the second degree, committed on November 18, 1985, for which a sentence of 2 to 4 years was imposed. Defendant did not contest or controvert this 1985 conviction. On appeal, we remitted the matter to County Court for resentencing because no sentence had been imposed on the predicate felony before defendant committed the felonies enumerated above (148 AD2d 836). Inasmuch as sodomy in the second degree was the only prior felony alleged and due to our determination that this crime did not qualify as a predicate felony, we remitted for defendant's resentence "as a first felony offender" (id., at 838). The prosecution then requested and was granted reargument, in which it was shown that the prosecution had another prior felony that it wished to substitute for the sodomy second degree conviction. Based on this showing, we amended our prior decision to delete the words "as a first felony offender". At resentencing, the People relied upon defendant's 1985 conviction in Albany County Court, in which he was sentenced as a second felony offender on the basis of an earlier Federal felony conviction in Louisiana, to establish the existence of the Federal conviction as the predicate felony (see, CPL 400.21 [8]). Defendant was sentenced to the same term as originally imposed.

On this appeal, defendant's only claim is that the principles of double jeopardy precluded the People from seeking to have him sentenced as a second felony offender upon remittal. According to defendant, the prior proceeding to sentence him as a second felony offender, in which the People failed to prove a valid predicate felony, barred the People from seeking to establish a different predicate felony at the resentencing. In a case involving this State's second and persistent felony offender statutes, the Court of Appeals held "that the protections embodied in the double jeopardy clauses of the Federal and State Constitutions do not apply to these enhanced sentencing proceedings" (People v Sailor, 65 NY2d 224, 226, cert denied 474 US 982). Although the Sailor case is distinguisnable on its facts, and it contains some language which appears to limit the scope of its broadly worded holding (id., at 236), we are of the view that the general principles articulated therein (see, id., at 229-235) are equally applicable to this case. Accordingly, we reject defendant's double jeopardy claim (see, People v Sanchez, 131 AD2d 605).

Judgment affirmed.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and HARVEY, JJ., concur.